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Kwan Ngen Wah & Anor v Julita bt Tinggal

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02(NCVC)(A)-1899-09 OF 2018
ABDUL KARIM, RAVINTHRAN AND AHMAD ZAIDI IBRAHIM JJCA
7 MARCH 2022

C

Native Law and Custom — Land dispute — Native title — Jurisdiction of court — Application by respondent to challenge native certificates of appellants — Whether District Native Court had jurisdiction to invalidate native certificates of appellants — Whether s 24 of Native Courts Enactment 1992 should be given literal meaning

D

This was an appeal against the decision of the High Court in Kota Kinabalu in granting the judicial review application by the respondent to quash the judgment of Justice Ismail Brahim who sat as the presiding judge of the three-member panel of the Native Court of Appeal. The instant dispute was
E about native status of the first appellant and Kwan Ngen Chung (deceased) who was represented by his administratrix, the second appellant. In September of 1979, the appellants applied for native status at the Kota Kinabalu Native Court. They were successful. The declaration of native status was scrutinised and endorsed as correct by the District Officer. Both appellants were issued
F 'native certificates' by the Native Court ('the native certificates'). The Native Court that heard the application of the appellants was constituted by the predecessor of the Native Courts Enactment 1992, ie the Native Courts Ordinance 1953. The native certificates of the appellants were challenged some 37 years later against the backdrop of a rival claim to native lands. In 1992, the
G appellants purchased 46 parcels of native title lands from their owners. The titles were not issued at that time. Titles were issued to the 46 landowners in 2001. But a third party managed to become the registered owner. He sold the lands to a non-native who caused the lands to be registered in the name of his sister in law ie the respondent. The respondent sold the lands to one Hiew Kon
H Fah in 2005 who commenced an action in the High Court sitting in Sandakan against the appellants to recover possession. In that suit, Hiew Kon Fah challenged the native status of the appellants. Under the Sabah Land Ordinance 1930, only a native was entitled to purchase native title land. The High Court rejected the challenge to the native status of the appellants holding
I that the jurisdiction to determine the native status belonged to the Native Court. The respondent then filed an application to the District Native Court at Kota Kinabalu under s 16(1) of the Native Courts Enactment 1992 to challenge the native certificates of the appellants ('the application'). The District Native Court decided that the native certificates were forged and were

invalid. The appellants filed an appeal to the Native Court of Appeal which was presided by a High Court judge ie Justice Ismail Brahim and two members who were Native Chiefs. The two lay members were of the opinion that the District Native Court had jurisdiction in the matter of the application. They dismissed the appeal and affirmed the decision of the District Native Court. On the other hand, Justice Ismail Brahim held that s 16 of the Native Courts Enactment 1992 did not have retrospective effect and therefore the District Native Court did not have jurisdiction to hear the application. Justice Ismail Brahim held that as the matter did not involve native law or custom, he was not required to seek the opinion of the lay members and declared his judgment as the final judgment of the Native Court of Appeal. The respondent filed the instant judicial review application to reverse the judgment of Justice Ismail Brahim. The learned High Court judge granted: (a) the order to quash the judgment of Justice Ismail Brahim; and (b) a declaration that the majority judgment be recorded as the final judgment. Hence, this appeal.

Held, allowing the appeal:

(1) The District Native Court did not possess jurisdiction to invalidate the native certificates. The argument of the respondent that the District Native Court could revise native certificates issued under the general revisionary power in s 16 of the Native Courts Enactment 1992 was not tenable. The principle of generalia specialibus non derogant applied in this case and deprived the District Native Court of jurisdiction to revisit the legality of native certificates. Section 16 of the Native Courts Enactment 1992 was a general provision that granted supervisory authority to the District Native Court over the Native Court. It could not supplant the authority of the District Officer or the Board of Officers under s 3(3) of the Interpretation (Definition of Native) Ordinance 1952 (Sabah Cap 64). It would not have been possible under any provision of the Native Courts Ordinance 1953 to revisit the native certificates in question. By virtue of s 3(4) of the Interpretation (Definition of Native) Ordinance 1952 (Sabah Cap 64), the native certificates had become 'conclusive'. Furthermore, s 16 of the Native Courts Enactment 1992 did not have retrospective application in that it could be invoked to review native certificates that were issued before it came into force. Therefore, the District Native Court acted in excess of jurisdiction when it admitted the application of the respondent to invalidate the 37-year-old native certificates of the appellants. The majority lay members in the Native Court of Appeal committed the same error (see paras 16, 21, 25, 27, 29 & 32).

(2) The learned High Court judge erred in not considering the jurisdiction point and the legislative purpose of empanelling a High Court judge to sit in the Native Court of Appeal. It was not necessary for the appellants to obtain an order of certiorari to quash the majority judgment as it was

a nullity from the outset and because the presiding judge of the Native Court of Appeal treated the majority judgment as a non-decision for want of jurisdiction and pronounced his judgment to be the final judgment. The High Court erred in declaring the majority judgment to be the final judgment. The absurdity that would result in a plain reading of s 24 of the Native Courts Enactment 1992 could be avoided by reading the limiting words of 'native law and custom' in respect of the judgment that would prevail by a majority of its members. Otherwise, the intention of the Sabah Legislature in empanelling a High Court judge to sit at the apex Native Court would be frustrated. Furthermore, it had always been the practice of Native Chiefs at the Native Court of Appeal to defer to the opinion of the High Court judge on a legal issue that was unconnected with native law and custom (see paras 34, 36, 45 & 49).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi di Kota Kinabalu yang membenarkan permohonan semakan kehakiman oleh responden untuk membatalkan penghakiman Yang Arif Ismail Brahim yang bersidang sebagai ketua panel hakim tiga anggota Mahkamah Rayuan Anak Negeri. Pertikaian ini adalah mengenai status anak negeri perayu pertama dan Kwan Ngen Chung (si mati) yang diwakili oleh pentadbirnya, perayu kedua. Pada September 1979, perayu-perayu memohon taraf anak negeri di Mahkamah Anak Negeri Kota Kinabalu. Mereka berjaya. Pengisytiharan status anak negeri telah diteliti dan disahkan sebagai betul oleh Pegawai Daerah. Kedua-dua perayu telah dikeluarkan 'sijil anak negeri' oleh Mahkamah Anak Negeri ('sijil anak negeri'). Mahkamah Anak Negeri yang mendengar permohonan perayu telah ditubuhkan oleh pendahulu Enakmen Mahkamah Anak Negeri 1992, iaitu Ordinan Mahkamah Anak Negeri 1953. Sijil anak negeri perayu telah dicabar kira-kira 37 tahun kemudian dengan latar belakang tuntutan saingan ke atas tanah anak negeri. Pada tahun 1992, perayu-perayu membeli 46 petak tanah hak milik anak negeri daripada pemiliknya. Gelaran itu tidak dikeluarkan pada masa itu. Hakmilik telah dikeluarkan kepada 46 pemilik tanah pada tahun 2001. Tetapi pihak ketiga berjaya menjadi pemilik berdaftar. Dia menjual tanah kepada bukan anak negeri yang menyebabkan tanah itu didaftarkan atas nama kakak iparnya iaitu responden. Responden menjual tanah kepada seorang Hiew Kon Fah pada 2005 yang memulakan tindakan di Mahkamah Tinggi yang bersidang di Sandakan terhadap perayu untuk mendapatkan semula milikan. Dalam saman itu, Hiew Kon Fah mencabar status anak negeri perayu-perayu. Di bawah Ordinan Tanah Sabah 1930, hanya anak negeri yang berhak membeli tanah hak milik anak negeri. Mahkamah Tinggi menolak cabaran terhadap status anak negeri perayu yang berpendapat bidang kuasa untuk menentukan status anak negeri adalah milik Mahkamah Anak Negeri. Responden kemudiannya memfailkan permohonan kepada Mahkamah Anak Negeri Daerah di Kota Kinabalu di bawah s 16(1) Enakmen Mahkamah Anak Negeri 1992 untuk mencabar sijil anak negeri perayu ('permohonan').

Mahkamah Anak Negeri Daerah memutuskan bahawa sijil anak negeri telah dipalsukan dan tidak sah. Perayu-perayu memfailkan rayuan kepada Mahkamah Rayuan Anak Negeri yang diketuai oleh Hakim Mahkamah Tinggi iaitu Yang Arif Ismail Brahim dan dua anggotanya yang merupakan Ketua Anak Negeri. Kedua-dua ahli awam itu berpendapat Mahkamah Anak Negeri Daerah mempunyai bidang kuasa dalam urusan permohonan itu. Mereka menolak rayuan dan mengesahkan keputusan Mahkamah Anak Negeri Daerah. Sebaliknya, Hakim Ismail Brahim berpendapat bahawa s 16 Enakmen Mahkamah Anak Negeri 1992 tidak mempunyai kesan retrospektif dan oleh itu Mahkamah Anak Negeri Daerah tidak mempunyai bidang kuasa untuk mendengar permohonan itu. Yang Arif Ismail Brahim memutuskan bahawa memandangkan perkara itu tidak melibatkan undang-undang atau adat anak negeri, beliau tidak perlu mendapatkan pendapat ahli awam dan mengisytiharkan penghakimannya sebagai penghakiman muktamad Mahkamah Rayuan Anak Negeri. Responden memfailkan permohonan semakan kehakiman ini untuk membatalkan penghakiman Yang Arif Ismail Brahim. Hakim Mahkamah Tinggi yang bijaksana memberikan: (a) perintah untuk membatalkan penghakiman Yang Arif Ismail Brahim; dan (b) pengisytiharan bahawa penghakiman majoriti direkodkan sebagai penghakiman muktamad. Oleh itu, rayuan ini.

Diputuskan, membenarkan rayuan:

(1) Mahkamah Anak Negeri Daerah tidak mempunyai bidang kuasa untuk membatalkan sijil anak negeri. Hujahan responden bahawa Mahkamah Anak Negeri Daerah boleh menyemak sijil anak negeri yang dikeluarkan di bawah kuasa penyemakan am dalam s 16 Enakmen Mahkamah Anak Negeri 1992 tidak boleh dipertahankan. Prinsip generalia specialibus non derogant digunakan dalam kes ini dan melucutkan bidang kuasa Mahkamah Anak Negeri Daerah untuk menyemak semula kesahihan sijil anak negeri. Seksyen 16 Enakmen Mahkamah Anak Negeri 1992 adalah peruntukan am yang memberikan kuasa penyeliaan kepada Mahkamah Anak Negeri Daerah ke atas Mahkamah Anak Negeri. Ia tidak boleh menggantikan kuasa Pegawai Daerah atau Lembaga Pegawai di bawah s 3(3) Ordinan Tafsiran (Definisi Anak Negeri) 1952 (Sabah Cap 64). Adalah tidak mungkin di bawah mana-mana peruntukan Ordinan Mahkamah Anak Negeri 1953 untuk menyemak semula sijil anak negeri yang dipersoalkan. Berdasarkan s 3(4) Ordinan Tafsiran (Definisi Anak Negeri) 1952 (Sabah Cap 64), sijil anak negeri telah menjadi 'konklusif'. Tambahan pula, s 16 Enakmen Mahkamah Anak Negeri 1992 tidak mempunyai pemakaian retrospektif yang boleh digunakan untuk menyemak sijil anak negeri yang telah dikeluarkan sebelum ia berkuat kuasa. Oleh itu, Mahkamah Anak Negeri Daerah bertindak melebihi bidang kuasa apabila membenarkan permohonan responden untuk membatalkan sijil anak negeri perayu-perayu berusia

37 tahun. Majoriti ahli awam di Mahkamah Rayuan Anak Negeri melakukan kesilapan yang sama (lihat perenggan 16, 21, 25, 27, 29 & 32).

(2) Hakim Mahkamah Tinggi yang bijaksana telah terkhilaf kerana tidak mengambil kira sudut bidang kuasa dan tujuan perundangan untuk menugaskan hakim Mahkamah Tinggi bersidang di Mahkamah Rayuan Anak Negeri. Perayu tidak perlu mendapatkan perintah certiorari untuk membatalkan penghakiman majoriti kerana ia adalah batal dari awal lagi dan kerana ketua hakim Mahkamah Rayuan Anak Negeri menganggap penghakiman majoriti sebagai bukan keputusan kerana tiada bidang kuasa dan menyatakan penghakimannya sebagai penghakiman terakhir. Mahkamah Tinggi terkhilaf mengisytiharkan penghakiman majoriti sebagai penghakiman muktamad. Tidak masuk akal yang akan diakibatkan oleh pembacaan biasa s 24 Enakmen Mahkamah Anak Negeri 1992 boleh dielakkan dengan membaca perkataan mengehadkan 'undang-undang dan adat anak negeri' berkenaan dengan penghakiman yang akan diguna pakai oleh majoriti ahlinya. Jika tidak, hasrat Dewan Undangan Negeri Sabah untuk menugaskan Hakim Mahkamah Tinggi untuk bersidang di Mahkamah Anak Negeri tertinggi akan gagal. Tambahan pula, adalah selalu menjadi amalan Ketua Anak Negeri di Mahkamah Rayuan Anak Negeri untuk menurut pendapat hakim Mahkamah Tinggi mengenai isu undang-undang yang tidak berkaitan dengan undang-undang dan adat anak negeri (lihat perenggan 34, 36, 45 & 49).]

Cases referred to

Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor [1979] 2 MLJ 101; [1978] 1 LNS 44, FC (refd)

Jamili bin Mohiman v Lim Nyuk Foh & Anor [2019] MLJU 1832; [2019] MLRHU 1635, HC (refd)

Madlis bin Azid @ Aziz v Board of Officers & Ors [2015] 5 MLJ 844; [2015] 3 CLJ 168, CA (refd)

Tan Kim Hock Product Centre Sdn Bhd & Anor v Tan Kim Hock Tong Seng Food Industry Sdn Bhd [2018] 2 MLJ 1; [2018] 2 CLJ 567, FC (refd)

Ungkari bin Ikus v Hon Chung Lip Case No BKI-47–10/12 of 2015 (unreported) (folld)

Legislation referred to

Interpretation (Definition of Native) Ordinance 1952 (Cap 64) s 3, 3(1), (2), (3), (4)

Land Ordinance 1930 (Cap 68)

Native Courts (Declaration of Native) Interpretation Rules 1958

Native Courts Enactment 1992 ss 2, 6, 16, 16(1), (1)(d), 17, 20, 21, 24, 31

Native Courts Ordinance 1953 (Cap 86) (repealed by Native Courts Enactment 1992) ss 4(5), 8, 10A
Rules of Court 2012 O 53 r 2(4)
Trade Descriptions Act 2011 s 9

Appeal from: Application for Judicial Review No BKI-13NCvC-17/10 of 2017(HC2) (High Court, Kota Kinabalu)

Cyrus V Das (with Rebecca Thong Fei Eng) (Szetu & Co) for the appellants.
Firoz Hussein bin Ahmad Jamaluddin (with Ansari bin Abdullah Ali and Muhamad Amirul bin Amin) (Ansari & Co) for the respondent.

Ravinthran JCA:

INTRODUCTION

[1] This is an appeal against the decision of the High Court sitting in Kota Kinabalu. The High Court granted the judicial review application by the respondent (Julita bt Tinggal) to quash the judgment of Justice Ismail Brahim who sat as the presiding judge of the three-member panel of the Native Court of Appeal. Consequently, the judgment of the remaining two lay members of the Native Court of Appeal who dissented from the judgment of Justice Ismail Brahim was declared as the final judgment.

BACKGROUND FACTS

[2] The instant dispute is about native status of the first appellant and Kwan Ngen Chung (deceased) who is represented by his administratrix, the second appellant. For ease of reference, we shall refer to them collectively as the appellants.

[3] Under s 3(1) of the Interpretation (Definition of Native) Ordinance 1952 (Sabah Cap 64), a person claiming to be native may apply to a Native Court established under the Native Courts Enactment 1992 for a declaration to that effect. Under s 3(2), the Native Court has exclusive jurisdiction to determine the application and grant a declaration to that effect. The judgment of the Native Court under s 3(3) is subject to review and scrutiny, and appeal to the District Officer or a Board of Officers appointed by the Yang Di-Pertua Negeri. Section 3(4) enacts that any decision under sub-s (1) shall be conclusive evidence for all purposes in respect of the matter or matters to which it relates.

[4] This provision was availed of by the appellants a long time ago. In September of 1979, they applied for native status at the Kota Kinabalu Native Court. They were successful. The declaration of native status was scrutinised and endorsed as correct by the District Officer. Both respondents were issued

'native certificates' by the Native Court. The Native Court that heard the application of the appellants was constituted by the predecessor of the Native Courts Enactment 1992, ie the Native Courts Ordinance 1953 (Cap 86).

[5] The native certificates of the appellants were challenged some 37 years later against the backdrop of a rival claim to native lands. In 1992, the appellants purchased 46 parcels of native title lands from their owners. They took possession of the lands. They developed an oil palm plantation on it. The titles were not issued at that time. Titles were issued to the 46 land owners in 2001. But a third party by the name of Abdul Hamid Duli managed to become the registered owner. He sold the lands to a non-native by the name Vun Yun Lau @ Vun Yun Liew Tony who caused the lands to be registered in the name of his sister-in-law who is the respondent herein (Julita bt Tinggal).

[6] Julita bt Tinggal sold the lands to one Hiew Kon Fah in 2005 who commenced an action in the High Court sitting in Sandakan in Suit No S22–27 of 2005 against the appellants to recover possession. In that suit, Hiew Kon Fah challenged the native status of the appellants. Under the Sabah Land Ordinance 1930 (Cap 68), only a native is entitled to purchase native title land. The High Court rejected the challenge to the native status of the appellants. It held that the jurisdiction to determine the native status belonged to the Native Court. The claim of Hiew Kon Fah was dismissed and the counterclaim of the appellants herein (respondents in the Sandakan in Suit No S22–27 of 2005) was allowed on 28 October 2011. Hiew Kon Fah's appeal to the Court of Appeal was unsuccessful and the matter is now pending before the Federal Court.

[7] Julita bt Tinggal then filed an application to the District Native Court on 27 March 2017 at Kota Kinabalu to challenge the native certificates of the appellants that were issued on 12 May 1979. The District Native Court is the middle tier court in the native court system. It is presided by the District Officer and two members who are District Chiefs or Native Chiefs. Below it is the Native Court that is presided by a District Chief and two members from the ranks of Native Chiefs. Above it is the Native Court of Appeal which is presided by a High Court judge and two members from the ranks of District Chiefs or Native Chiefs. Lawyers may not appear for any party in the Native Court or District Native Court. However, they may represent any party at the Native Court of Appeal provided they are registered as a 'Native Court of Appeal advocate' in accordance with prescribed procedure.

[8] The application of Julita bt Tinggal was made under s 16(1) of the Native Courts Enactment 1992. The District Native Court did not decide the matter immediately. It decided some four years later after giving short notice to the appellants. On 19 May 2016, it decided that the native certificates were

forged and were invalid. The appellants were aggrieved by this decision. They filed an appeal to the Native Court of Appeal. It was presided by Justice Ismail Brahim and two members (Matsah bin Sahat and Awang Hanib bin Kassim) who are Native Chiefs. Parties were represented by legal counsel at the appeal hearing.

[9] The Native Court of Appeal delivered its judgment on 14 July 2017. The two lay members were of the opinion that the District Native Court had jurisdiction in the matter of the application of Julita bt Tinggal to revise the decision of the Native Court that issued the native certificates in question in 1979. They found that the native certificates were fake and/or irregular as the appellants had admitted in another suit that their parents came from China. They dismissed the appeal and affirmed the decision of the District Native Court. On the other hand, Justice Ismail Brahim only dealt with a question of law. He held that s 16 of the Native Courts Enactment 1992 does not have retrospective effect and therefore the District Native Court did not have jurisdiction to hear the application of Julita bt Tinggal to invalidate the native certificates in question. In coming to this conclusion, Justice Ismail Brahim adopted the view of Justice Douglas Cristo Primus Sikayun who presided in the Native Court of Appeal in the case of *Ungkari bin Ikus v Hon Chung Lip* Case No BKI-47–10/12 of 2015.

[10] The issue in the *Ungkari* case was the same as in the instant appeal. The applicant attempted to invalidate the native certificate issued to the respondent in 1981. The application for revision was made under s 16 of the Native Courts Enactment in 2011. Justice Douglas Cristo Primus Sikayun observed that s 16 which granted wide powers of revision to the District Native Court had no equivalent in the predecessor Native Courts Ordinance 1953. Under the repealed Ordinance, the District Officer had limited powers to scrutinise the decision of the Native Court. Citing the Federal Court case of *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101, His Lordship held that under s 3(3) of the Interpretation (Definition of Native) Ordinance 1952 (Sabah Cap 64), an appeal lies against the declaration of native status and since there was no appeal, the native certificate is final and conclusive. His Lordship also held that nothing in the Native Courts Enactment 1992 suggests that it has retrospective effect. In respect of s 24, Justice Douglas Cristo Primus Sikayun expressed the view that the role of the two lay members was confined to matters of native law and custom only.

[11] After deciding the jurisdiction point in respect of s 16 of the Native Courts Enactment 1992, Justice Ismail Brahim held that as the matter did not involve native law or custom, he is not required to seek the opinion of the lay members and declared his judgment as the final judgment of the Native Court of Appeal. His Lordship followed the decision of Justice Douglas Cristo Primus

Sikayun in the *Ungkari* case on this point as well. Justice Douglas Cristo Primus Sikayun's view was also endorsed by Justice Mairin bin Idang @ Martin at the High Court in the judicial review case of *Jamili bin Mohiman v Lim Nyuk Foh & Anor* [2019] MLJU 1832; [2019] MLRHU 1635.

[12] Julita bt Tinggal filed the instant judicial review application to reverse the judgment of Justice Ismail Brahim who sat as the presiding judge of the Native Court of Appeal. The two main reliefs sought in the judicial review are as follows:

(a) an order of certiorari to quash the decision of Justice Ismail Brahim as the final judgment; and

(b) a declaration that the judgment of the two native chiefs be recorded as the final judgment.

[13] The learned High Court judge gave careful consideration to s 24 of the Native Courts Enactment 1992. The provision reads as follows:

> 24 Judgement of appellate Court
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> The judgement of an appellate Court shall be unanimous or that of the majority of its members.

[14] Under s 2, an 'appellate Court' means a District Native Court or the Native Court of Appeal. Her Ladyship held that since the provision is unambiguous, Justice Ismail Brahim had acted contrary to s 24 in recording his judgment as the final judgment of the Native Court of Appeal. Her Ladyship further held that the lay members who are Native Chiefs have equal standing under the Native Courts Enactment 1992. Her Ladyship then declined to determine the jurisdiction issue in relation to s 16 and granted the order to quash the judgment of Justice Ibrahim Brahim. Her Ladyship also granted a declaration that the majority judgment be recorded as the final judgment.

ISSUES

[15] Before us the two main issues argued are whether s 24 should be given a literal meaning in that regardless of the subject matter of the judgment, all members of the Native Court of Appeal should have equal say and whether District Native Court that invalidated the Native Certificates of the appellants had jurisdiction to do so in the first place. We shall first determine the jurisdiction point.

JURISDICTION

[16] In our view, the District Native Court did not possess jurisdiction to invalidate the native certificates. Our reasons are as follows.

[17] The jurisdiction of the Native Court in Sabah is set out in s 6 of the Native Courts Enactment 1992 which reads as follows:

> 6(1) Every Native Court shall exercise original jurisdiction *to the extent set forth* and *subject to the provisions of this Enactment* to hear, try, determine and dispose of the following cases:
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> (a) cases arising from breach of native law or custom in which all the parties are natives;
>
> (b) cases arising from breach of native law or custom, religious, matrimonial or sexual, if the written sanction of the District Officer acting on the advice of two Native Chiefs has been obtained to the institution of the proceedings, where one party is a non-native;
>
> (c) cases involving native law or custom relating to —
>
> (i) betrothal, marriage, divorce, nullity of marriage and judicial separation;
>
> (ii) adoption, guardianship or custody of infants, maintenance of dependants and legitimacy; and
>
> (iii) gifts or succession testate or intestate.
>
> (d) other cases *if jurisdiction is conferred upon it by this Enactment or any other written law*. (Emphasis added.)

[18] The italicised words to which we have drawn attention circumscribes the width of the jurisdiction of the Native Courts. Section 6 emphatically states that the jurisdiction of the Native Courts is only to 'the extent set forth' and 'subject to the provisions this Enactment'. Section 6(1)(d) states the Native Court has jurisdiction if it is conferred by the Enactment or 'any other written law'. Section 3 of the Interpretation (Definition of Native) Ordinance 1952 (Sabah Cap 64) is an instance of jurisdiction being conferred on the Native Court by 'other written law'. However, as noted earlier, it only confers jurisdiction to the Native Court to determine the native status of a person. Section 3 does not confer the power to the Native Court or any appellate Native Court to revisit or revise the native certificates issued under it.

[19] We shall now turn to the jurisdiction and powers of the District Native Court under the Native Courts Enactment 1992. Sections 16 and 17 of the Native Courts Enactment 1992 provides for the powers of the District Native Court. Section 16 provides for its revisionary jurisdiction over the Native Court whereas s 17 sets out its appellate powers. In addition, s 21 states that the appellate courts shall have all the powers and privileges of a Native Court. Under s 2, the appellate court means the District Native Court and the Native Court of Appeal.

[20] In the instant case, Julita bt Tinggal applied to the District Native Court

to invoke its revisionary power under s 16 to invalidate the native certificates in question. Section 16 reads as follows:

> Power of revision.
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> PART IV REVISION AND APPEAL
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> (1) All proceedings of every Native Court shall be subject to revision by the District Native Court which, if it considers that such proceedings are irregular, improper or unconscionable, may quash or vary the same or direct a rehearing.
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> (2) A District Native Court may call for and examine the record of proceedings of a Native Court for the purpose of satisfying itself as to the correctness, legality or propriety of any order recorded or passed and as to the regularity of any proceedings of such court.
>
> (3) In exercising its powers of revision, a District Native Court shall have the discretion whether to allow the parties involved a right to be heard:
>
> Provided that no final order shall be made to the prejudice of any person unless such person has had an opportunity of being so heard.

[21] This is a general provision conferring revisionary power to the District Native Court as it is above the Native Court in the native court system. It must be observed that there is no specific mention of the power to revisit native certificates that were issued by the Native Court under another law, ie the Interpretation (Definition of Native) Ordinance 1952 (Sabah Cap 64). In our opinion, the argument of the respondent that the District Native Court can revise native certificates issued under the general revisionary power in s 16 is not tenable for the following reason. Under s 3(3) of the Interpretation (Definition of Native) Ordinance 1952 (Sabah Cap 64), revisionary and appellate power in respect of native certificates issued by the Native Court is specially conferred on the District Officer or to the Board of Officers appointed for that purpose by the Head of State. The provision reads as follows:

> 3(3) Any declaration of any Native Court made in the exercise of the jurisdiction conferred upon it by subsection (2) shall be subject to review and scrutiny by, and appeal to the District Officer or a Board of officers appointed by the Yang di-Pertua Negeri for the purpose.

[22] It must be noted that this is a comprehensive provision that gives oversight role to the District Officer or Board of Officers in relation to the Native Court's power to issue native certificates. It not only provides for 'review and scrutiny' but also provides an avenue for 'appeal' to the District Officer or the Board of Officers. The role of the Board of Officers was discussed by this court in the case of *Madlis bin Azid @ Aziz v Board of Officers & Ors* [2015] 5 MLJ 844; [2015] 3 CLJ 168. In that case, the appellants claimed that the native certificate of the third respondent was forged or did not exist. They

applied to the Board of Officers (the third respondent) to review the native certificate. The question that arose in the appeal was whether a third party apart from an applicant who claims native status can apply for review of the native certificate to the Board of Officers. The Court of Appeal by a majority answered the question in the affirmative. We are mindful that the issue at hand is different. Nonetheless, the point to note is that in that case, the court recognised that an avenue for revision or appeal (even by third parties) exists in s 3(3) of the Interpretation (Definition of Native) Ordinance 1952 (Sabah Cap 64). But as we said earlier, this avenue must be availed of before the District Officer or the Board of Officers appointed for that purpose.

[23] The majority judges in the above-mentioned case also cited *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101; [1978] 1 LNS 44 and said that if there is no appeal against the declaration of native status, the declaration becomes final and binding under s 3(4) of the Interpretation (Definition of Native) Ordinance 1952 (Sabah Cap 64).

[24] We also note that s 3(2) and (3) came into its present form with effect from 1 January 1983 (see Enactment 10/1983). Therefore, when the Native Courts Enactment 1992 came into force on 1 April 1993, the Sabah Legislature must be deemed to be aware of the provision for revision and appeal in respect of native certificates in s 3(3) of the Interpretation (Definition of Native) Ordinance 1952 (Sabah Cap 64). However, no provision was made to remove the power given to the District Officer or the Board of Officers in s 3(3) of the Interpretation (Definition of Native) Ordinance 1952 (Sabah Cap 64) or to confer concurrent power in respect of the same matter to the District Native Court.

[25] In the premises, we are of the view that the principle of *generalia specialibus non derogant* should apply in this case and deprive the District Native Court of jurisdiction to revisit the legality of native certificates. The proper authority that has jurisdiction in the matter is the District Officer or the Board of Officers set up for that purpose under s 3(3) of the Interpretation (Definition of Native) Ordinance 1952 (Sabah Cap 64). Thus, s 16 of the Native Courts Enactment 1992 is a general provision that grants supervisory authority to the District Native Court over the Native Court. It cannot supplant the authority of the District Officer or the Board of Officers under s 3(3) of the Interpretation (Definition of Native) Ordinance 1952 (Sabah Cap 64).

[26] We are also of the view that Justice Ismail Brahim correctly held that s 16 of the Native Courts Enactment 1992 cannot be invoked to invalidate native certificates issued in 1979 as it has no retrospective effect. Nothing in the Enactment suggests it has retrospective effect. There is no equivalent of s 16

which gives broad powers of revision in the repealed Native Courts Ordinance 1953. The District Native Court did not exist either under the old Ordinance. Appeals from a Native Court under the Ordinance was to a District Officer. Section 8 of the repealed Ordinance provided that all decisions of the Native Court are subject to 'scrutiny' of the District Officer. It reads as follows:

> 8 All proceedings of Native Court shall be subject to scrutiny by the District Officer who, if he considers that such proceedings are irregular, improper or unconscionable, may quash or vary the proceedings or a direct a rehearing.

[27] The power to scrutinise proceedings of the Native Court in s 8 is similar to the power vested in s 3(3) of the Interpretation (Definition of Native) Ordinance 1952 (Sabah Cap 64) in the District Officer. This power was exercised by the District Officer in 1981 as the native certificates of the appellants bear his endorsement 'diperiksa and didapati betul' (scrutinised and found to be correct) which are the statutory words found in the prescribed format of the native certificate under Native Courts (Declaration of Native) Interpretation Rules 1958. Thus, from 1979–1992, it would not have been possible under any provision of the Native Courts Ordinance 1953 to revisit the native certificates in question. An appeal by any interested party could have been made to the District Officer or Board of Officers under s 3(3) of the Interpretation (Definition of Native) Ordinance 1952 (Sabah Cap 64) but it was never done. Therefore, by virtue of s 3(4), the native certificates have become 'conclusive'. The provision reads as follows:

> (4) The final decision on any application made under subsection (1) shall be conclusive evidence for all purposes in respect of the matter or matters to which it relates.

[28] In the premises, the invocation of s 16 of the Native Courts Enactment 1992 to revisit the validity of the native certificates in question is only permissible if it had been made clear that it has retrospective effect. This is because it would impair the existing rights of the holder of the native certificates in question.

[29] We would therefore agree with the judgment of Justice Ibrahim Brahim at the Native Court of Appeal in this case and the judgment of Justice Douglas Cristo Primus Sikayun at the same court in the *Ungkari* case that s 16 of the Native Courts Enactment 1992 does not have retrospective application in that it can be invoked to review native certificates that were issued before it came into force. We also agree with the following observation of Justice Douglas Cristo Primus Sikayun:

> If the intention of the State Legislature is to equip and empower the Native Courts with powers of revision and review for any rulings, orders or decisions made prior to 1992, it must then be clearly stated. There must be a safeguard measure to sieve litigious matters, matters such as limitation of time must be considered and taken

into account. Further issues of void and voidability must be resolved and settled by the legislators and should not be left to the courts to grapple and unravel. Even the High Court does not have an unlimited revisionary and review powers. It can be an unruly horse. It is always subject to restrictions.

[30] In concluding that s 16 cannot be availed of by Julita bt Tinggal to challenge the native certificates in question, we have also considered the import of s 31 of the Native Courts Enactment 1992 which repealed the Native Courts Ordinance 1953 and provided some saving measures in respect of the continuity of the operation of the Native Courts and the validity of its past orders. It reads as follows:

(a) any Native Court established under a warrant issued under the repealed Ordinance and exercising jurisdiction immediately prior to the commencement of this Enactment shall be deemed to be a Native Court constituted under this Enactment having territorial jurisdiction set out in the warrant of such court;

(b) any District Chief, Native Chief and Headman empowered by the State Secretary under the repealed Ordinance to adjudicate in any Native Court established therein shall be deemed to be so empowered under this Enactment until the same is revoked;

(c) any pending cases validly instituted before any Native Court or any appellate authority established under the repealed Ordinance shall continue to be heard, dealt with and disposed of by the corresponding court constituted under this Enactment in like manner as if the same were commenced under the provisions of this Enactment;

(d) any order validly made by any Native Court or any appellate authority established under the repealed Ordinance shall continue to be valid and enforceable under this Enactment as if the same were made by the corresponding court constituted thereunder; and

(e) any subsidiary legislation made under the repealed Ordinance shall in so far as it is not inconsistent with this Enactment continue to be in force and have effect as if the same had been made hereunder and may be repealed, varied or amended under this Enactment.

[31] By virtue of this provision, it can be argued that the present day Native Court, the District Native Court and the Native Court of Appeal are the successor courts of the Native Court, Office of the District Officer and the Native Court of Appeal under Native Courts Ordinance 1953. Nonetheless, the equivalent of s 16 of the Native Courts Enactment 1992 which gave very broad powers of revision did not exist in the old Ordinance. Furthermore, s 3(3) of the Interpretation (Definition of Native) Ordinance 1952 (Sabah Cap 64) provides for the finality of native certificates in question if there is no appeal under the same provision. For this reason, even if the District Native Court is

A viewed as a successor court of the office of the District Officer, we do not think that a successor court can re-open previous decisions without limitation of time and impair vested substantive rights as stated in the *Ungkari* case. By comparison, in s 20, the time limited for appeal is only 60 days. In the instant case, the challenge to the native certificates were mounted some 37 years later B because of a competing claim in respect of transactions involving native lands.

[32] For all the above reasons, we are of the view that regardless of the merit of the case, the District Native Court acted in excess of jurisdiction when it admitted the application of Julita bt Tinggal to invalidate the 37-year old native C certificates of the appellants. The majority lay members in the Native Court of Appeal committed the same error.

SECTION 24 OF THE NATIVE COURTS ENACTMENT 1992

D

[33] As we pointed out earlier, s 24 enacts that the judgment of the Native Court of Appeal shall be unanimous or by a majority. The learned High Court judge gave a plain literal reading to the provision and declared that the final judgment is the judgment of the majority members, ie the lay Native Chiefs.

E

[34] With the greatest of respect, we are of the opinion that Her Ladyship erred in not considering the jurisdiction point and the legislative purpose of empanelling a High Court judge to sit in the Native Court of Appeal. Our reasons are as follows.

F

[35] We shall firstly discuss the impact of the jurisdiction point on s 24 we have given our reasons why we concluded that the District Native Court had no jurisdiction to invalidate the native certificates in question. In the premises, the judgment of the District Native Court was a nullity. For the same reason, G the majority judgment of the two lay members of the Native Court of Appeal who ruled that they had jurisdiction to affirm the decision of the Native Court was also a nullity. We are mindful of the argument of counsel for Julita bt Tinggal that the appellant did not file a judicial review application to quash the majority judgment. The response of counsel for the appellant was that Justice H Ismail Brahim had declared his judgment to be the final judgment and therefore they were not the adversely affected party in the contemplation of O 53 r 2(4) of the Rules of Court 2012 to be clothed with locus standi to apply for judicial review.

I **[36]** Be that as it may, we are of the view that it was not necessary for the appellants to obtain an order of certiorari to quash the majority judgment as it was a nullity from the outset and because the presiding judge of the Native Court of Appeal treated the majority judgment as a non-decision for want of jurisdiction and pronounced his judgment to be the final judgment.

Furthermore, the fact that the majority judgment was not binding and did not require an application for it to be set aside was tacitly acknowledged by Julita bt Tinggal as she took out the instant judicial review application to quash Justice Ismail Brahim's judgment. Thus, the High Court erred in declaring the majority judgment to be the final judgment. The judgment of the presiding judge should not have been quashed but should have been allowed to prevail as the final judgment of the Native Court of Appeal.

[37] For the above reasons, we are of the view that regardless of the interpretation of s 24, the judgment of the presiding judge should not have been quashed as it was the only judgment upon which lawful reliance could be placed.

[38] We shall now consider the construction to be placed on s 24 of the Native Courts Enactment 1992. Section 24 did not exist in the old Ordinance. Section 10A of the Native Courts Ordinance 1953 provided that the Native Court of Appeal shall be composed a High Court judge, the resident and one Native Chief. There is no mention that the judgment shall be by a majority vote. The only mention of majority judgment was in respect of the Native Court which was composed entirely of lay Native Chiefs. Section 4(5) provided as follows:

> The judgment of a Native Court shall be that of the majority of its members. Where their opinion is equally divided the suit or prosecution shall fail.

[39] However, in the Native Courts Enactment 1992, s 24 provides that a judgment of the appellate court shall be unanimous or that of the majority of its members. At the Native Court of Appeal in this case, Justice Ismail Brahim said as follows in respect of the role of the lay members:

> Although the NCE is silence on the role of the Presiding Judge, I take the view that he may seek the advice of the other two members when deliberating or deciding on matters involving customs or 'adat'. However, when the matter calls for deliberation on the issue of law [other than customary law or adat] the presiding judge is not required to seek the advice or assistance of the two members, even though they may have legal background. The duty to decide on the issues of law must be left to the presiding judge alone. If this is not observed there would be a situation where cases may be decided without sufficient consideration given to the law applicable to matter before the court. It is for this reason, I think the provision that the High Judge is to act as the presiding judge over the Native Court of Appeal was included in the NCE. The same approach had already been taken in Ungkari's case and I will adopt the same approach here.

[40] In the *Ungkari* case, Justice Douglas Cristo Primus Sikayun opined as follows on the same matter:

I have taken into consideration the views expressed by my two pengapits. But the issue before this Native Court of Appeal is purely one of law. It should be clearly noted and understood that the role of the two pengapits is to adjudge and advise on matters of adat leaving legal issues to the presiding judge to decide as he is better disposed to handle such matters.

[41] We are of the view that Justice Ismail Brahim and the other judges (Justice Douglas Cristo Primus Sikayun's in the *Ungkari* case and Justice Mairin bin Idang @ Martin in the *Jamili bin Mohiman* case) adopted the correct approach to s 24. We made this determination after considering the legislative purpose behind the empanelment of a High Court judge in the Native Court of Appeal as well as the absurdity that will result if lay members are at liberty to give any judgment they wished without regard to the law at the highest tier of the Native Court system. Our reasons are as follows.

[42] We reproduced in full s 6 of the Native Courts Enactment 1992 earlier. It sets out the jurisdiction of the Native Courts. It must be noticed that jurisdiction of the Native Courts is only in respect of native law and custom governing matters such as marriage, divorce, adoption, guardianship, inheritance and certain criminal offences involving sexual misconduct and the like.

[43] In the premises, it follows that Native Chiefs are present at all tiers of the native court system because their expertise in native law and custom is required in the adjudication of disputes in matters that fall under s 6. As opined by Justice Ismail Brahim and Douglas Cristo Primus Sikayun, a High Court judge is the presiding judge of the Native Court of Appeal under the Native Courts Enactment 1992 for a good reason. The Sabah Legislature had anticipated that issues of civil law that is unconnected with native law and custom may arise in the adjudication of disputes. These issues are best dealt by a High Court judge.

[44] In the instant case the question of law that arose at the outset of the Native Court of Appeal hearing was the power of the District Native Court to admit the application of Julita bt Tinggal and the issue of retrospectivity of written law. However, both Native Chiefs decided on these issues without deferring to the opinion of the presiding High Court judge. It cannot be the intention of the Sabah Legislature that the majority comprising lay Native Chiefs can outvote the High Court judge at Native Court of Appeal on matters that do not involve native law or custom and which are patently outside their areas of competence. This state of affairs, if allowed to prevail, may on occasion even give rise to conflict between decisions of Native Courts and that of the civil courts.

[45] For the above reasons, we agree with counsel for the appellant that the absurdity that would result in a plain reading of s 24 can be avoided by reading the limiting words of 'native law and custom' in respect of the judgment that will prevail by a majority of its members. Amongst the authorities cited by counsel for the appellant to persuade us to read s 24 in this manner is the Federal Court case of *Tan Kim Hock Product Centre Sdn Bhd & Anor v Tan Kim Hock Tong Seng Food Industry Sdn Bhd* [2018] 2 MLJ 1; [2018] 2 CLJ 567.

[46] The above-mentioned case centred on the effect of a plain reading of s 9 (since repealed) of the Trade Descriptions Act 2011. The respondent obtained what is known as trade description order ('TDO') under the provision by way of an ex parte application which was the prevailing practice by stakeholders in the industry. Section 9 does not expressly say that the application can be made ex parte.

[47] The Federal Court considered the fact that a TDO, though quasi criminal in effect, can only be meaningfully used if the element of surprise is preserved pending further action by the trademark owner. The Federal Court also carefully considered the purpose of the Trade Descriptions Act 2011 which was to afford better protection to traders and consumers alike. The court, speaking through Balia Yusof Wahi FCJ, then said as follows:

> [45] Section 9(1) of Act 730 merely provides that any person 'may apply to the High Court' ... Supplementing the words 'ex parte' into the provision would certainly achieve the very purpose for the enactment of the provision and satisfy the mischief which the provision seeks to overcome. It is also in accord with the provisions of s 17A of the Interpretation Acts 1948 and 1967 on the purposive approach of interpretation. To borrow the words of Denning LJ in the *Seaford Court Estates* case, it is to give 'force and life' to the intention of the Legislature.

[48] The Federal Court in the above mentioned case read the word 'ex parte' into s 9 in order to render a TDO workable and promote the legislative purpose in question. The Federal Court also quoted with approval the following passage from the *Discipline of Law* by Lord Denning to support its approach:

> The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the 'purposive approach' ... In all cases now in the interpretation of statutes we adopt such a construction as will 'promote the general legislative purpose' underlying the provision. It is no longer necessary for the judges to wring their hands and say: 'There is nothing we can do about it'. Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it — by reading words in, if necessary — so as to do what Parliament would have done, had they had the situation in mind.

[49] In the instant case as well, as we said earlier, the limiting words of 'native law and custom' should be read into s 24 to avoid the absurdity that will result in a literal reading of the provision. Otherwise, the intention of the Sabah Legislature in empanelling a High Court judge to sit at the apex Native Court would be frustrated. Furthermore, as observed by Justice Ismail Brahim in this case and by Justice Douglas Cristo Primus Sikayun in the *Ungkari* case it has always been the practice of Native Chiefs at the Native Court of Appeal to defer to the opinion of the High Court judge on a legal issue that is unconnected with native law and custom.

CONCLUSION

[50] For all the above reasons, we unanimously allow the appeal and set aside the decision of the High Court in the judicial review application. The respondent shall pay costs of RM45,000 here and below to the appellants which shall be subject to allocatur.

Appeal allowed.

Reported by Ahmad Ismail Illman Mohd Razali